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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

Estate of MARK R. HUGHES, Deceased.	
CONRAD LEE KLEIN, JACK REYNOLDS and CHRISTOPHER PAIR, as Co-Executors, Petitioners and Appellants, v. SUZAN HUGHES, as Guardian of the Estate of Alexander Hughes, Objector and Respondent.	A109497 (Los Angeles County Super. Ct. No. BP062549)

This is an appeal from an order imposing a surcharge in the amount of $200,000, plus interest, against Conrad Lee Klein, Jack Reynolds and Christopher Pair (collectively, appellants), the executors of the estate of Mark R. Hughes (estate). Appellants contend the probate court erred in imposing the surcharge because no substantial evidence proved that they acted with gross negligence in administering the estate, or that the estate sustained a resulting loss. Appellants further contend the probate court erred by placing the burden on them to prove the estate sustained no loss resulting from their gross negligence. We affirm.

BACKGROUND

Mark R. Hughes (Mark), founder of Herbalife International, Inc. (Herbalife), died in 2000. Pursuant to his will, Mark's son, Alex Hughes, is principal beneficiary of the estate. Alex's mother, Suzan Hughes (respondent), is guardian of the estate.

In addition to their duties as executors of the estate, appellants, in their individual capacities, are actively involved in the management and governance of Mark's former company, Herbalife. Klein serves as Herbalife's chief business affairs officer, Reynolds serves as chairperson of Herbalife's board of directors, and Pair serves on Herbalife's board of directors and as chief executive officer.

In October 2001, appellants filed with the probate court the First Account and Report of Co-Executors and Petition for Approval Thereof and First Status Report (first account), later supplemented, in which they accounted for over $49 million in estate assets and receipts, $33.8 million in disbursements and other debits, and over $15.2 million in assets on hand. Among other things, the first account detailed creditors' claims against the estate worth over $500 million.

In December 2001, respondent raised objections to several creditors' claims that had been approved by appellants, including three claims submitted by Herbalife: (1) a $236,939.56 claim for personal expenses charged to Mark's corporate credit card (credit card claim); (2) a $2,047,613.87 claim for expenses incurred in connection with Mark's wedding to his fourth wife (wedding claim); and (3) a $2 million claim for expenses incurred in connection with Mark's unsuccessful efforts to take Herbalife private (corporate transaction claim).

A three day trial began on September 9, 2003. The probate court found that appellants had properly approved the wedding and corporate transaction claims, but had acted with gross negligence in approving the credit card claim. On reconsideration, the probate court affirmed its ruling. Accordingly, the probate court imposed against appellants a $200,000 surcharge, plus interest at a rate of 10% per annum, representing

the approximate loss sustained by the estate due to their gross negligence in approving the credit card claim (surcharge order).[1] This appeal followed.

DISCUSSION

The probate court issued the surcharge order under Probate Code section 9601, subdivision (a)(1), which provides that an executor who fails to use the requisite degree of care in administering the estate may be liable for reimbursing the estate for "[a]ny loss or depreciation in value of the decedent's estate resulting from the breach of duty, with interest."[2] Mark's will permitted appellants to be surcharged under this statute only if their conduct in administering the estate amounted to bad faith or gross negligence.

Appellants seek to reverse the surcharge order on the grounds that (1) the evidence was insufficient to support the probate court's finding that they were grossly negligent in approving the credit card claim, (2) the probate court erroneously placed the burden on them to prove the estate sustained no loss resulting from their gross negligence, and (3) the evidence was insufficient to support the probate court's finding that the estate sustained a resulting loss.[3]

A. Standard of Review.

We review the probate court's factual findings under the substantial evidence rule. Accordingly, our power "begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the [probate court's] conclusion." (*Estate of Auen* (1994) 30 Cal.App.4th 300, 311.) "Substantial evidence" is "evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634,

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[1] The probate court declined to order a surcharge for $236,939.56, the total amount of the credit card claim, reasoning that "the amount . . . should not exceed approximately the amount of statutory fees they would otherwise be entitled to."

[2] Unless otherwise stated, all citations herein are to the Probate Code.

[3] There is no claim here that appellants' conduct amounted to bad faith.

651.) "Inferences may constitute substantial evidence, but they must be the product of logic and reason. Speculation or conjecture alone is not substantial evidence." (*Ibid*.)

We review factual issues most favorably to respondent and in support of the judgment. (*Estate of Auen, supra*, 30 Cal.App.4th at p. 311.) We defer to the probate court's judgment on issues of credibility, and resolve all conflicts in the evidence in favor of respondent. (*Ibid*.) "If . . . substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874, italics omitted.)

We review de novo the probate court's legal determination regarding allocation of the burden of proof. (See *Villa v. McFerren* (1995) 35 Cal.App.4th 733, 741.)

B. Substantial Evidence Supported the Finding of Gross Negligence.

Appellants challenge the probate court's finding that they acted with gross negligence in approving the credit card claim. Gross negligence is the " 'want of even scant care or an extreme departure from the ordinary standard of care. [Citations.]' " (*Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1185-1186, quoting *Franz v. Board of Medical Quality Assurance* (1982) 31 Cal.3d 124, 138.) "Negative in nature, [gross negligence] implies an absence of care." (*Johns-Manville Sales Corp. v. Workers' Comp. Appeals Bd*. (1979) 96 Cal.App.3d 923, 930.) Applying the substantial evidence rule on review, we deem the following facts significant.

The credit card claim represented charges on Mark's corporate credit card for purchases presumably made by him in the United States and abroad at, among other places, designer clothing and jewelry boutiques, restaurants, pharmacies, liquor and cigar stores and museums. Some charges were over two years old at the time of Mark's death. Appellants' attorneys rather than Herbalife's filed the claim with the probate court on Herbalife's behalf.

Pursuant to an Herbalife corporate policy, which Mark generally adhered to before his death, charges on an employee's corporate credit card were deemed personal

expenses, payable by the employee, unless the employee submitted proof that a particular charge was a business expense payable by the company. Mark routinely reimbursed Herbalife for personal expenses charged to his corporate credit card, assuming one of his trusted assistants, Samantha Faulkner or Carrie Burton, or his accountant Annie Chang considered the charges and advised him no basis existed for claiming them as business expenses. Appellants suggest they followed a similar process in paying the credit card claim, and thus cannot be held grossly negligent. Neither the evidence nor the law supports their claim.

The evidence proved appellants relied heavily on the creditor, Herbalife and its personnel, to prepare the credit card claim and to confirm its validity. Appellants did not independently investigate the charges, confirm whether anyone else adequately investigated the charges, or request supporting documentation beyond isolated, incomplete copies of credit card bills that Herbalife provided in submitting the claim.

In particular, appellants relied on representations from Herbalife's former chief financial officer, Timothy Gerrity, and his staff that the claim was valid without seeking additional information. Gerrity admitted he had no personal knowledge regarding whether the charges were of a personal or business nature, and appellant Klein admitted he had "very little" such knowledge. Neither Gerrity nor appellants could confirm that Faulkner, Burton or Chang, rather than some unidentified person, considered each charge and identified those that were personal.[4] Moreover, neither party called Faulkner, Burton or Chang to testify in this case regarding their alleged involvement in identifying the personal charges. In the absence of competent evidence, we thus decline appellants' invitation to infer "the classification of personal and business expenses was done in this

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[4] At trial, Gerrity testified he believed Faulkner had reviewed the relevant credit card bills and identified on each bill which charge(s) were for Mark's personal expenses. At his pre-trial deposition, however, Gerrity testified he could not recall who identified them. And on cross-examination at trial, Gerrity admitted Chang rather than Faulkner may have identified the personal charges. Given these inconsistencies, the probate court could properly have discredited Gerrity's testimony. (*Estate of Auen, supra*, 30 Cal.App.4th at p. 311.)

instance, as it had always been done, by [Mark's] assistant and an accountant." (See *Roddenberry, supra*, 44 Cal.App.4th at p. 651 [an inference based on speculation alone does not constitute substantial evidence].)

Appellants further insist they approved the credit card claim only after negotiating with Herbalife at "arm's length" to resolve it. Again, the evidence fails to support their claim. No witness described specific negotiations, much less arm's length negotiations, occurring between appellants and Herbalife before the credit card claim was approved. The probate court thus properly declined to infer such negotiations occurred, particularly given appellants' individual roles in the Herbalife business. (*Roddenberry, supra*, 44 Cal.App.4th at p. 651.)

Appellants suggest that, in any event, a mere glance at the credit card charges – for cigars, jewelry, designer clothing and other things – reveals they were personal in nature, and thus valid debts of Mark's estate. The evidence, however, demonstrated that Mark's business and personal expenses could not be so easily segregated. Mark's business life and personal life were tightly interconnected, and he often entertained and bought lavish gifts for business associates with his corporate credit card.

Appellants also contend there can be no gross negligence as a matter of law because no evidence proved the credit card charges were invalid. We disagree. The issue is whether appellants acted with gross negligence in validating the charges, not whether the charges were in fact invalid. Accordingly, the absence of evidence relating to the charges' validity does not rebut as a matter of law respondent's showing that appellants were grossly negligent in validating them. (*Sargent Fletcher, Inc. v. Able Corp*. (2003) 110 Cal.App.4th 1658, 1669 (*Fletcher*) [a defendant "acts at its peril if it fails to present evidence that rebuts the plaintiff's showing"].)

Appellants point to evidence they consulted with counsel on all claims submitted to the estate before approving or rejecting them. There was no evidence, however, of specific discussions with counsel regarding the credit card claim. Moreover, while evidence of consultation with counsel may have supported a finding that appellants were not grossly negligent, given the record as a whole it provides no ground for reversing the

probate court's contrary finding. (*Roddenberry, supra*, 44 Cal.App.4th at p. 652 [reviewing court defers to a trial court's reasonable findings of fact].) The probate court could reasonably have discounted appellants' "advice-of-counsel" rationale given the absence of any evidence of what information their counsel possessed or relied upon, if any, in allegedly advising them on the claim. (*Ibid*.)

Ultimately, we are left with appellants' claim that, given Mark's death, it would have been "impossible" to determine whether the credit card charges were business or personal in nature. The flaw in appellants' claim is that they never tried to determine the nature of the charges. Accordingly, we do not know whether the task would have been impossible, and the trial court properly declined to speculate. (*Roddenberry, supra*, 44 Cal.App.4th at p. 651.)

On the record before it, the probate court properly found appellants acted without "even scant care," i.e. grossly negligent, in approving the credit card claim. (*Eastburn, supra*, 31 Cal.4th at pp. 1185-1186, quoting *Franz, supra*, 31 Cal.3d at p. 138.)

C. Appellants Had the Burden to Prove the Estate Sustained No Loss Resulting From Their Gross Negligence.

Section 9601, subdivision (a)(1), limits the surcharge for which an executor may be held liable to the amount of "[a]ny loss or depreciation in value of the decedent's estate resulting from the breach of duty, with interest." (*See also Estate of Gerber* (1977) 73 Cal.App.3d 96, 109 ["An executor . . . is liable to reimburse the estate for legally compensable losses proximately resulting from his failure to exercise the requisite duty of care in administration."].) Here, the probate court placed the burden on appellants to prove the estate sustained no "loss [n]or depreciation" as a result of their gross negligence in approving the credit card claim. (Prob. Code, § 9601, subd. (a)(1).) In doing so, appellants contend the probate court erred. We disagree.

Appellants have been authorized by a prior court order in this case to administer the estate pursuant to the Independent Administration of Estates Act, sections 10500 et seq. (IAEA). Accordingly, appellants are authorized to approve or reject creditors'

claims against the estate without seeking prior court approval.[5] (See Prob. Code, §§ 10500 et seq.) As a trade off, however, statutory law places the burden on appellants to prove the validity of an approved claim when, like here, it is contested by an interested person:

"The validity of an allowed or approved claim may be contested by any interested person at any time before settlement of the report or account of the personal representative in which it is first reported as an allowed or approved claim. *The burden of proof is on the contestant, except where the personal representative has acted under the Independent Administration of Estates Act (Part 6 (commencing Section 10400)), in which case the burden of proof is on the personal representative*." (Prob. Code, § 9254; emphasis added.

Appellants concede that, as executors administering under the IAEA, they had the burden under section 9254 to prove the charges underlying the credit card claim were valid estate debts. They contend, however, respondent had the burden under section 9601, subdivision (a)(1) to prove an actual loss to the estate resulted when they approved the claim. The probate court disagreed, reasoning the alleged loss in this case was the amount the estate paid to settle the allegedly invalid credit card charges. Accordingly, requiring respondent to prove that loss would undermine appellants' burden under section 9254 to prove the credit card charges were properly paid.

We agree with the probate court's reasoning. As a factual matter, to prove the credit card charges were valid, section 9254 required appellants to present evidence the charges were debts owed by the estate. To prove the estate sustained a loss resulting from appellants' payment of the credit card charges, section 9601, subdivision (a)(1)

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[5] "[P]ersonal representatives with IAEA authority may exercise a broad range of estate administration powers that otherwise could be exercised only with 'court supervision.' . . . [I]n the long run, IAEA authority expedites estate administration by reducing court involvement, simplifying routine administration tasks, and substantially saving on the time and expense involved in traditional estate administration." (Ross & Moore, Cal. Practice Guide: Probate (The Rutter Group 2005) [¶] 9:1, p. 9-1.)

required evidence the charges were *not* debts owed by the estate. Because these two factual issues are "opposite sides of the same coin" (see *Fletcher, supra*, 110 Cal.App.4th at p. 1669), requiring respondent to prove the charges were not owed would undermine appellant' burden under section 9254 to prove they were owed. (See Evid. Code, § 500 ["a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting"].) Accordingly, we conclude that, under these facts, appellants had the burden to prove the estate sustained no loss as a result of their gross negligence.

D. Appellants Failed Their Burden to Prove the Estate Sustained No Loss Resulting from Their Gross Negligence.

Appellants further contend the evidence was insufficient to support the amount of the surcharge imposed against them -- $200,000 plus interest. We disagree. As stated above, appellants had the burden to prove the estate sustained no actual loss as a result of their gross negligence in approving the credit card claim. Appellants failed that burden. They offered no evidence regarding whether the particular charges underlying the credit card claim were valid debts of the estate. As such, the record is devoid of substantial evidence that the estate sustained no loss when appellants paid the claim. Accordingly, appellants were properly surcharged for the estate's resulting loss of funds. (*Roddenberry, supra,* 44 Cal.App.4th at p. 655 ["An absence of evidence is not the equivalent of substantial evidence. [Citation.] If an absence of evidence could satisfy the burden of proof, the concept of burden of proof would have no meaning."].)

DISPOSITION

The surcharge order is affirmed. Costs are awarded to respondent.

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Parrilli, J.

We concur:

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McGuiness, P. J.

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Pollak, J.